



(Billing Code 5001-06)

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 212 and 252**

**[Docket DARS-2016-0015]**

**RIN 0750-AI93**

**Defense Federal Acquisition Regulation Supplement: Pilot Program on Acquisition of Military Purpose Nondevelopmental Items (DFARS Case 2016-D014)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is adopting as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2016 that changes the criteria for the pilot program for acquisition of military purpose nondevelopmental items.

**DATES:** Effective [Insert date of publication in the FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Ms. Carrie Moore, telephone 571-372-6093.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD published an interim rule in the Federal Register at 80 FR 42557 on June 30, 2016, to implement section 892 of the National Defense Authorization Action (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92). Section 892 removes the requirements under the pilot program for the use of competitive procedures and for awards to be made to nontraditional defense contractors. Section 892 also increases the threshold for use of the pilot program to contracts up to \$100 million. Two respondents submitted public comments in response to the interim rule.

## **II. Discussion and Analysis**

DoD reviewed the public comments in the development of the final rule. A discussion of the comments received and the changes made to the rule as a result of those comments is provided, as follows:

### A. Summary of Significant Changes From the Interim Rule

One change is made in the final rule as a result of a public comment. The prescription at DFARS 212.7103 for DFARS provision 252.212-7002, Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items, is revised to clarify its use in solicitations when use of the pilot program is planned and the applicability criteria are met.

### B. Analysis of Public Comments

#### 1. General

Comment: One respondent recommended rewording the prescription at DFARS 212.7103 to clarify proper use of the provision.

Response: The prescription at DFARS 212.7103 is revised to state, "Use the provision at 252.212-7002, Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items, in solicitations when use of the pilot program is planned and the applicability criteria of 212.7102-1 are met."

## 2. Implementation

Comment: One respondent suggested revising the text at DFARS 212.7102-1(d) to capture the removal of the requirement to use competitive procedures under the pilot program by adding, "Each contract entered into under the pilot program shall be exempt from the requirement for the use of competitive procedures."

Response: The respondent's suggestion is outside the scope of the authority provided by section 892. The statute removes the requirement that each contract under the pilot program be awarded using the competitive procedures at 10 U.S.C. chapter 137. Section 892 does not provide any further exemptions to the competition requirements outlined in the FAR and DFARS. The interim rule accomplishes the goal of section 892 by removing from the applicability criteria for the pilot program at DFARS 212.7102-1 the requirement to award using competitive procedures. No additional text is required.

### **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items**

The requirements of section 892 of the NDAA for FY 2016 do not apply to contracts at or below the SAT. Additionally, while FAR part 12 commercial procedures may be used to acquire military purpose nondevelopmental items under this pilot program, the rule does not apply to the acquisition of commercial items, including COTS items.

### **IV. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### **V. Regulatory Flexibility Act**

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This final rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 892 of the National Defense Authorization Act for Fiscal Year 2016. The objective of the rule is to modify the criteria for the pilot program at DFARS 212.71, Pilot Program for the Acquisition of Military Purpose Nondevelopmental Items, to increase the opportunities for use of the program. The rule removes the criteria that contracts must be awarded to "nontraditional defense contractors" and awards must be made using competitive procedures. The rule also increases the dollar threshold for the program to allow use on procurements up to \$100 million.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis provided in the interim rule.

The changes to the pilot program will have a positive economic impact on small businesses that did not meet the definition of "nontraditional defense contractors" and have developed products that could be applied to a military purpose. According to data available in the Federal Procurement Data System for FY 2015, 6,514 unique small businesses were awarded a DoD contract in excess of the certified cost and pricing threshold (\$750,000)

and therefore did not meet the definition of "nontraditional defense contractor." Prior to the changes made by this rule these small businesses were not eligible for an award under the pilot program. These small businesses will now be able to participate in the pilot program if they are developing a military purpose nondevelopmental item.

This rule does not impose any new reporting, recordkeeping, or other compliance requirements. No significant alternatives were identified during the development of this rule.

#### **VI. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### **List of Subjects in 48 CFR Parts 212 and 252**

Government procurement.

**Jennifer L. Hawes,**

Editor, Defense Acquisition Regulations System.

Accordingly, the interim rule amending 48 CFR parts 212 and 252, which was published in the Federal Register at 80 FR 42557 on June 30, 2016, is adopted as a final rule with the following change:

#### **PART 212—ACQUISITION OF COMMERCIAL ITEMS**

1. The authority citation for part 212 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Revise section 212.7103 to read as follows:

**212.7103 Solicitation provision.**

Use the provision at 252.212-7002, Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items, in solicitations when use of the pilot program is planned and the applicability criteria of 212.7102-1 are met.

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